Nos. 06-340, 06-549

IN THE

Supreme Court of the United States

NATIONAL ASSOCIATION OF HOME BUILDERS, *et al.*,

Petitioners,

v.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* FOR THE FEDERAL WATER QUALITY COALITION IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

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BRIEF OF *AMICUS CURIAE* FOR THE FEDERAL WATER QUALITY COALITION IN SUPPORT OF PETITIONS FOR WRIT OF *CERTIORARI*

STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

The Federal Water Quality Coalition (the "Coalition") is a group of industrial companies, municipal entities, agricultural parties, and trade associations that are directly affected, or which have members that are directly affected, by regulatory decisions made under the federal Clean Water Act (the "CWA") (33 U.S.C. § 1251, *et seq.*).[2] Coalition member entities or their members own and operate facilities located on or near waters of the United States. These entities operate pursuant to individual or general National Pollution Discharge Elimination System ("NPDES") wastewater or stormwater permits, which were issued by EPA or, if EPA

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1. Pursuant to Rule 37.6 of the Rules of the Court, the Federal Water Quality Coalition states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the Coalition, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief.

2. Consent by all of the parties has been given to the Coalition for filing this brief. Petitioners National Association of Home Builders, Southern Arizona Home Builders Association, Home Builders Association of Central Arizona, Arizona Chamber of Commerce, Arizona Mining Association, Arizona Association of Industries, Greater Phoenix Chamber of Commerce, and American Forest & Paper Association; Respondents Defenders of Wildlife, Center for Biological Diversity, and Craig Miller; and the State of Arizona have submitted letters to the Court consenting to the filing of all *amicus curiae* briefs in this matter. The United States Environmental Protection Agency ("EPA"), who has separately filed a Petition for writ of *certiorari* in this matter, has provided written consent to the Coalition to file this brief. The Coalition submitted EPA's consent letter to the Court concurrent with its filing of this brief.

has transferred permitting authority pursuant to section 402(b) of the CWA (33 U.S.C. § 1342(b) ("CWA § 402(b)")), by state water quality agencies.

The Ninth Circuit decision interpreted section 7(a)(2) of the federal Endangered Species Act (16 U.S.C. § 1536(a)(2) ("ESA § 7(a)(2)")), as imposing an additional requirement on CWA § 402(b) transfer decisions that is not contained in the CWA. This new requirement would directly affect the administration of the NPDES permitting program as it is applied to Coalition members. The facilities of Coalition members are now regulated by 45 state-administered NPDES programs.[3] If broadly adopted and applied, the Ninth Circuit decision, in direct conflict with the plain language and legislative intent of the CWA and decisions of other federal circuits, would now require those state-administered programs to comply with ESA § 7(a)(2), even though that statute's scope is expressly limited to federal agency actions. As a result, states may be required to develop burdensome procedures to consult with the United States Fish and Wildlife Service and the National Marine Fisheries Service (collectively, the "ESA Services") to insure that the issuance of NPDES permits are not likely to jeopardize the existence of endangered species in compliance with ESA § 7(a)(2). Implementation of such procedures would significantly delay state issuance of NPDES permits, and would lead to more burdensome permits for the regulated community, including Coalition members. If a state cannot demonstrate to EPA that its administration of its NPDES program complies with ESA § 7(a)(2), EPA could be forced to withdraw its approval of the NPDES program and resume authority for issuing that state's wastewater and stormwater discharge permits. Because the responsibility for administering as many as 45 state NPDES programs could revert to EPA, the permitting process would potentially drain EPA's resources and drastically hamper the

3. The State of Alaska has indicated that it is developing an application for the transfer of NPDES permitting authority.

regulated community's ability to obtain timely discharge permits. In either case—whether permitting authority remains with the states or reverts to EPA—regulated entities, including Coalition members, will be adversely affected. Therefore, the Coalition and its members have an interest in maintaining the current, well-established NPDES program, which will be undermined by the Ninth Circuit decision.

REASONS FOR GRANTING THE PETITION

SUMMARY OF ARGUMENT

The Ninth Circuit decision imposes an additional requirement on the implementation of the NPDES program that is not contained in CWA § 402(b); in fact, that new requirement directly conflicts with the language and legislative intent of the CWA. The Ninth Circuit ruled that pursuant to ESA § 7(a)(2), EPA must insure that any action to transfer NPDES permitting authority to a state under CWA § 402(b) is not likely to jeopardize the continued existence of any endangered species. *Defenders of Wildlife v. EPA*, 420 F.3d 946, 967 (9th Cir. 2005). The Ninth Circuit held that EPA failed to comply with ESA § 7(a)(2) in transferring NPDES permitting authority to the State of Arizona, as evidenced, according to the court, by the mere fact that Arizona, as a state agency, is not required to comply with the consultation requirement of ESA § 7(a)(2). *Id.* at 971. Based on that holding, the Ninth Circuit vacated EPA's transfer approval, despite the fact that the plain language of CWA § 402(b) mandates that EPA "shall approve" the transfer of permitting authority. *Id.* at 979.[4]

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4. The Ninth Circuit specifically held that "the EPA's transfer decision will cause whatever harm may flow from the loss of *section 7* consultation on the many projects subject to a water pollution permit, and that harm constitutes an indirect effect of the transfer." *Defenders of Wildlife*, 420 F.3d at 971 (emphasis in original).

The Petitions for writ of *certiorari* should be granted for three reasons. First, the Ninth Circuit decision directly conflicts with opinions from two other circuits: *American Forest & Paper Ass'n v. EPA*, 137 F.3d 291 (5th Cir. 1998) and *Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 962 F.2d 27 (D.C. Cir. 1992).[5] Indeed, the Ninth Circuit acknowledged the conflict between its decision and the decisions from the Courts of Appeals for the Fifth and District of Columbia Circuits. *Defenders of Wildlife*, 420 F.3d at 970. This conflict has been raised in all of the Petitions

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5. In *American Forest*, the Fifth Circuit considered the exact question that was presented to the Ninth Circuit. *See* 137 F.3d at 297 ("The key question is whether EPA may deny a state's proposed program based on a criterion — the protection of endangered species — that is not enumerated in § 402(b).") Unlike the Ninth Circuit, the Fifth Circuit found that:

> [t]here is no hint that Congress intended to grant EPA authority to erect additional hurdles to the permitting process beyond those expressly noted in § 402(b). . . . The statute's plain language directs EPA to approve proposed state programs that meet the enumerated criteria; particularly in light of the command 'shall approve,' [the CWA] cannot be construed to allow EPA to expand the list of permitting requirements.

Id. at 298.

The Ninth Circuit decision also conflicts with the District of Columbia Circuit's decision in *Platte River*. In that case, the petitioners asserted that section 7 of the ESA required the Federal Energy Regulatory Commission to impose endangered species-related provisions in a hydropower project license that already protected endangered species. The District of Columbia Circuit disagreed, stating "[w]e think the Trust's interpretation of the ESA is far-fetched. As the Commission explained, the statute directs agencies to 'utilize their authorities' to carry out the ESA's objectives; it does not *expand* the powers conferred on an agency by its enabling act." *Id.* at 34 (emphasis in original).

for writ of *certiorari*, and the uncertainty created by the circuit conflict will have an adverse impact on the regulated community. For this reason alone, the Petitions should be granted.

Second, the issue decided by the Ninth Circuit involves a federal issue of significant importance. The Ninth Circuit decision essentially writes a new requirement into CWA § 402(b), contrary to the plain language of that statute. The statute imposes a mandatory duty on EPA to transfer authority to the states if nine specifically enumerated requirements are met.[6] The Ninth Circuit decision will allow ESA § 7(a)(2) to override this mandatory agency action. This concern has also been raised by all of the Petitioners and provides an independently sufficient reason for granting the Petitions.

In addition to the adequate reasons raised by the Petitioners, the Petitions for writ of *certiorari* should be granted because of the broad adverse effect the Ninth Circuit decision will have on EPA, state agencies, and the entities they regulate, including Coalition members, without any indication from Congress that such an impact is warranted. The legislative intent behind the NPDES program, as well as the CWA generally, is to allow the states to take a primary role in the regulation of pollutant discharges to their waters. 33 U.S.C. § 1251(b). The Ninth Circuit's disregard of this intent undermines the well-established system that has resulted in the mandatory EPA transfer of NPDES permitting authority to 45 states over the last 33 years.[7]

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6. There is no dispute that the State of Arizona met the requirements of sections 402(b)(1)-(9) of the CWA. *Defenders of Wildlife*, 420 F.3d at 963, n. 11.

7. The first state that EPA transferred NPDES permitting authority to was California on May 14, 1973. *See* National Pollution Discharge Elimination System (NPDES): Specific State Program Status (visited October 27, 2006) <http://cfpub.epa.gov/npdes/statestats.cfm?program_id=45&view=specific>.

The Ninth Circuit decision determined that strict state compliance with ESA § 7(a)(2) is the only means to ensure that state actions are not likely to jeopardize endangered species. As a result of that decision, in order for current state programs to maintain their NPDES authority or new state applicants to obtain a transfer pursuant to CWA § 402(b), states would apparently be required to adopt burdensome new mechanisms in strict compliance with the requirements of ESA § 7(a)(2). If the Ninth Circuit decision is left to stand, EPA could be required to revisit its CWA § 402(b) transfer decisions, and withdraw approval of state NPDES programs, regardless of independent state efforts to protect endangered species, if full state compliance with the requirements of ESA § 7(a)(2) cannot be demonstrated. 33 U.S.C. § 1342(c). This withdrawal directly conflicts with the language and legislative intent of the CWA, which envisioned an NPDES permitting program that would primarily be administered by the states, as is the case today. A broad withdrawal of state NPDES authority would have serious, widespread effects. EPA would be burdened by the return of permitting authority and would have its resources exhausted by the increased volume of new permitting decisions, potentially leading to burdensome delays on regulated facilities seeking permits. The Ninth Circuit decision unjustifiably undermines the NPDES system that EPA and the states have carefully developed for more than three decades.

The Ninth Circuit decision would also unreasonably shift statutory power to the ESA Services, as administrators of the ESA. Because there is no indication that the Ninth Circuit limited its decision to apply ESA § 7(a)(2) only to CWA § 402(b), EPA would apparently be required, by the logic of the decision, to consult with the ESA Services before performing numerous other mandatory EPA duties under the CWA and other environmental statutes. Moreover, all other federal agencies would also be required to consult with the ESA Services before acting under non-environmental

statutes, as recognized by the dissenting opinion on the denial of the Petition for Rehearing or Rehearing *En Banc* before the Ninth Circuit: "If the ESA were as powerful as the majority contends, it would modify not only EPA's obligation under the CWA, but *every* categorical mandate applicable to *every* federal agency." *Defenders of Wildlife v. EPA*, 450 F.3d 394, 399, n. 4 (9th Cir. 2006) (Kozinski, J., dissenting) (emphasis in original). The extensive effects of the Ninth Circuit decision cannot be overstated.

If broadly applied, the Ninth Circuit decision would cause substantial and unwarranted changes in the administration of the NPDES program, in violation of the CWA language and its underlying legislative intent. Because of the significant impact that the Ninth Circuit decision will have on EPA, other federal agencies, state agencies, and the regulated community, the Court should grant review.

I. The Ninth Circuit Decision Substantially And Adversely Affects The Well-Established NPDES Program In Conflict With The CWA Language And Legislative Intent.

A. Statutory framework of the NPDES program.

The objective of the CWA "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In furtherance of this goal, the CWA prohibits any person from discharging any pollutant into the waters of the United States from a point source unless the discharge complies with the CWA's statutory requirements. 33 U.S.C. § 1311(a). Section 402 of the CWA ("CWA § 402") authorizes EPA to issue NPDES permits for the discharge of pollutants, provided the discharge meets particular statutory requirements. 33 U.S.C. § 1342(a). As described by the Court, "[g]enerally speaking, the NPDES

[program] requires dischargers to obtain permits that place limits on the type and quantity of pollutants that can be released into the Nation's waters." *South Florida Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102 (2004).

The CWA also recognizes "that the States should have a significant role in protecting their own natural resources." *International Paper Co. v. Ouellette*, 479 U.S. 481, 489 (1987). To this end, CWA § 402(b) requires EPA to transfer to states the authority to implement and administer the NPDES permit program, if a state can meet the nine requirements in sections 402(b)(1)-(9) of the CWA. 33 U.S.C. § 1342(b)(1)-(9) ("The Administrator **shall approve** each such submitted program . . . .") (emphasis added). If a state seeks a transfer of the NPDES permitting program from EPA, the governor of such a state "may submit to the Administrator [of EPA] a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact." 33 U.S.C. § 1342(b). Once a state elects to implement its own program, and EPA approves such "submitted program" under the criteria of CWA § 402(b), state programs can issue permits that ensure compliance with the CWA. *Id.* Moreover, once a state permitting program is established, EPA will cease to administer the NPDES program in the state's jurisdiction and "shall suspend the issuance of permits under subsection (a) of this section as to those discharges subject to such program unless [EPA] determines that the State permit program does not meet the requirement of subsection (b) of this section . . . ." 33 U.S.C. § 1342(c).

Once EPA transfers NPDES permitting authority to a state, the state program "shall at all times be in accordance with" section CWA § 402. 33 U.S.C. § 1342(c)(2). EPA has a continuing duty to determine whether a state program is in compliance with CWA § 402. 33 U.S.C. § 1342(c)(3). If EPA

determines that a state is not complying with CWA § 402 in administering its NPDES program, EPA "shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, . . . the Administrator **shall** withdraw approval of such program." *Id.* (emphasis added). The permitting authority for that state then reverts to EPA under CWA § 402(a). 33 U.S.C. § 1342(a).

B. The Ninth Circuit decision undermines the NPDES program framework envisioned by Congress.

For the last 33 years, under CWA § 402(b), EPA has transferred authority to implement and administer the NPDES program to 45 states, including Arizona. *See* footnote 7, *supra*. In addition, the State of Alaska indicated in an *amicus curiae* brief before the Ninth Circuit that it is in the process of developing an application requesting the transfer of permitting authority under the NPDES program. The Ninth Circuit decision, however, subverts the current system that has been established by EPA's transfer of authority to the states. Under the Ninth Circuit decision, EPA could transfer permitting authority to a state under CWA § 402(b) only if the state demonstrates to EPA that it will comply with the express requirements of ESA § 7(a)(2). The Ninth Circuit decision could also require EPA to withdraw approval of state programs that are not in compliance with the requirements of ESA § 7(a)(2). 33 U.S.C. § 1342(c)(3) ("CWA § 402(c)(3)"). EPA could be required to insure that current state programs determine, in consultation with the ESA Services, that the issuance of permits under the program is not likely to jeopardize endangered species. *Id.* In other words, state-administered NPDES programs could have to strictly comply with ESA § 7(a)(2) in ongoing permit decisions as if the states were federal agencies, or EPA "shall so notify the State and, if appropriate corrective action is not taken within a reasonable time . . . the Administrator shall

withdraw approval of such program." *Id.* Thus, under the Ninth Circuit decision, if EPA does not ensure ongoing state implementation of ESA § 7(a)(2) when determining whether to withdraw its approval of a current state program, EPA may violate the ESA.[8]

This application of the ESA directly conflicts with the congressional objective that states take primary responsibilities under the CWA:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act. It is the policy of Congress that the States manage the construction

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8. The Coalition does not concede that EPA's determination of whether to withdraw permitting authority under CWA § 402(c) is an "action" for purposes of ESA § 7(a)(2). However, as explained in section II, *infra*, claims are being made that EPA's determination of whether to withdraw permitting authority is an action that requires ESA § 7(a)(2) consultation. *See Oregon Natural Res. Council v. Hallock, et al.*, Civil No. 02-1650-CO, 2006 WL 1142223, *8, 2006 U.S. Dist. LEXIS 27687, *23 (D. Or. Apr. 24, 2006); National Wildlife Federation, *et al.*, Notice of Intent to Sue for Violation of Endangered Species Act -- Failure of EPA to Consult on Effect of NPDES Delegation to the Washington State Dept of Ecology and Oversight on Threatened Puget Sound Chinook Salmon, at 3 (Apr. 19, 2006), <http://www.ecy.wa.gov/programs/wq/links/educate/attachments_to_noi/Nof1001.pdf>. If claims such as these succeed and a court decides that EPA's withdrawal determination under CWA § 402(c) is a federal action for purposes of ESA § 7(a)(2), then the logic of the Ninth Circuit decision seems to indicate that EPA would be required to withdraw NPDES permitting authority from state-administered programs based on noncompliance with ESA § 7(a)(2).

> grant program under this Act and implement the permit programs under sections 402 and 404 of this Act.

33 U.S.C. § 1251(b); *see also Ouellette*, 479 U.S. at 490 (The states have a "strong voice in regulating their own pollution," and should play a major role in protecting and preserving their own natural resources.); Robert V. Percival, *Symposium: Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1174-75 (1995) (citing the CWA as an example of "cooperative federalism," whereby the states have been granted the primary responsibility of administering and enforcing the permit program in a way that fits their objectives).

Moreover, the legislative history of the CWA indicates that it was Congress' expectation that the states have the primary role in the administration of the NPDES permitting program. S. COMM. ON PUBLIC WORKS, FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, S. Rep. No. 92-414, at 71 (1971) ("It is expected that the States will play a major role in the administration of this program.") Congress recognized that some states already possessed the broad expertise and capability to evaluate certain categories of discharge sources, and could therefore administer the permit system within their boundaries. *Id.* at 8 ("Talents and capacities of those States whose own programs are superior are to be called upon to administer the permit system within their boundaries.") In addition, during hearings before the Subcommittee on Air and Water Pollution of the Committee on Public Works, EPA Assistant Administrator John R. Quarles, Jr. stated:

> We are proceeding with the program that is based on trying to relate it to the existing structure of the Federal-State partnership established under the [CWA] and that structure places in the State the

> primary firing line responsibility for dealing with polluters, gathering information as to water quality conditions in the States, and prescribing levels of treatment that should be required. The Federal role is a backup role and we are trying to be more vigorous in pursuing our own responsibilities but not distort them into a fundamentally different level of responsibility.

Bills Amending the Federal Water Pollution Control Act and other Pending Legislation Relating to Water Pollution Control, Hearings before the S. Subcomm. on Air and Water Pollution of the Comm. on Public Works, 92nd Cong. 4356 (1971) (statement of John R. Quarles, Jr.). The conflict between the legislative intent of the CWA and the Ninth Circuit decision demonstrates the importance of the issue involved in this case and the substantial impact that the decision would have on the administration of the NPDES program and the CWA.

If the Ninth Circuit decision is left to stand, there would be, at least, two substantial adverse effects on the administration of the NPDES program. First, in order to avoid a denial of new applications for a transfer (such as for the State of Alaska) or a possible withdrawal of EPA's approval of current NPDES programs, states would be required to implement permitting programs that strictly comply with ESA § 7(a)(2), despite the fact that the plain language of ESA § 7(a)(2) applies only to federal agencies. 16 U.S.C. § 1536(a)(2). This required revision could have a sweeping effect on state NPDES programs, as states could have to consult with the ESA Services on all actions under the NPDES program, including decisions on individual wastewater or stormwater permits. The imposition of a direct ESA § 7(a)(2) consultation requirement on the states would drastically delay the states' ability to issue NPDES permits,

because states would now be required to wait for assessments from the ESA Services before issuing permits. Such a delay will adversely affect the regulated community; an increased delay will cause more uncertainty in planning to meet future discharge requirements, particularly if a renewed permit imposes more stringent discharge limits. Systematic delays in the NPDES system will substantially affect entities constructing new facilities or changing existing facilities, as such facilities may not be able to begin operations until EPA or a delegated state agency issues a permit. Moreover, a lengthier development period for an NPDES permit will lead to additional transaction costs (such as for additional meetings with permitting agencies and additional data collection and assessments) for obtaining a permit renewal.

The second likely effect of the Ninth Circuit decision is that EPA's review of whether state NPDES programs comply with ESA § 7(a)(2) could lead to EPA withdrawing approval of the programs. Once EPA withdraws its approval of a state NPDES program under CWA § 402(c)(3), the permitting authority for dischargers in that state would revert back to EPA under CWA § 402(a). 33 U.S.C. § 1342(a). Inevitably, the withdrawal of approval for a state program and transfer of the NPDES permitting authority back to EPA would affect the permitting process, as EPA would be required to shift its resources to handle a substantial increase in NPDES permitting applications and decisions. This result - centralizing permitting decisions with EPA - is a result that Congress was seeking to avoid in passing CWA § 402(b). This could exhaust EPA's resources on permitting decisions, due to the comprehensive and time-consuming analysis that is required for issuing NPDES permits. It is also unlikely that EPA would be able to match the volume of NPDES permits that are issued by the 45 states, leading to longer administrative processes for issuing discharge permits and an increase in the current backlog of outdated permits.

Further, EPA lacks the local expertise and knowledge of the state agencies regarding their own waterways, and would therefore need to conduct additional analysis that will further hold up the NPDES permitting process. The impact on EPA, state agencies, regulated entities and other stakeholders of potentially transferring 45 state NPDES programs back to EPA cannot be overstated. The Court should grant review to clarify the interplay between ESA § 7(a)(2) and the CWA, consistent with statutory language and legislative intent.

II. The Ninth Circuit Decision Impermissibly Shifts Authority To The ESA Services For An Assessment Of Agency Action.

Because the Ninth Circuit broadly held that ESA § 7(a)(2) effectively overrides the mandatory duties of EPA under another statute (the CWA), the ESA Services would gain significant authority under this rationale — not only under the CWA, but also under other statutes. ESA § 7(a)(2) states that each federal agency shall insure that its actions are not likely to jeopardize the existence of an endangered species "in consultation with and with the assistance of the" ESA Services. 16 U.S.C. § 1536(b). As to CWA § 402(b), the Ninth Circuit decision would impose an ongoing ESA § 7(a)(2) consultation responsibility on the states to whom EPA delegated the NPDES permitting authority. Although EPA would maintain its authority to make a determination under the nine elements of CWA § 402(b), the ESA consultation responsibility would become a 10th element, and the ESA Services would now have to be integrated into the state NPDES programs. Indeed, there are already indications that the Ninth Circuit decision is eroding the NPDES permitting program as administered by the states; multiple challenges to EPA decisions have been raised based on alleged noncompliance with ESA § 7(a)(2). *See Oregon Natural Res. Council v. Hallock, et al.*, Civil No. 02-1650-CO, 2006 WL 1142223, *8, 2006 U.S. Dist. LEXIS 27687, *23 (D. Or. Apr. 24, 2006) (Plaintiffs challenged the Oregon Department of Environmental Quality's

issuance of an NPDES permit on the ground that they had not initiated or completed a consultation with ESA Services); *see also* National Wildlife Federation, *et al.*, Notice of Intent to Sue for Violation of Endangered Species Act — Failure of EPA to Consult on Effect of NPDES Delegation to the Washington State Dept of Ecology and Oversight on Threatened Puget Sound Chinook Salmon, at 3 (Apr. 19, 2006), <http://www.ecy.wa. gov/programs/wq/links/educate/attachments_to_noi/Nofl001.pdf> (citing the Ninth Circuit decision, potential plaintiffs claimed that EPA's decision to delegate the authority to administer the NPDES program to the states requires compliance with ESA § 7). Nothing in the plain language of either the CWA or the ESA contemplates such a shift of authority to the ESA Services to be given lead authority over EPA and state implementation of the CWA and other statutes.

Moreover, the Ninth Circuit decision will fundamentally change the processes and analysis that are conducted in administering an NPDES program by either EPA or state agencies. Under CWA § 402, the focus of issuing an NPDES permit is on the pollutant discharge and whether the permit is consistent with the CWA. 33 U.S.C. § 1342(a). If ESA § 7(a)(2) is now imposed on CWA § 402, the critical inquiry will not be solely on whether the permit and the allowable pollutant discharges are consistent with the CWA, but rather the analysis will expand to address the effects of the permitted activity on endangered species. As a result, the development and issuance of an NPDES permit and the administration of the NPDES authority will fundamentally change from a focus on an analysis of pollutant discharges to an assessment of the likely effects of a project on endangered species. This shift is inconsistent with the language and intent of the CWA.

There is also no indication that the Ninth Circuit decision will be limited to EPA's duties under the CWA. The dissenting opinion on the denial of the Petition for Rehearing or Rehearing *En Banc* before the Ninth Circuit recognized the potential

breadth of the decision below as potentially applying to ". . . *every* categorical mandate applicable to *every* federal agency." *Defenders of Wildlife v. EPA*, 450 F.3d 394, 399, n. 4 (9th Cir. 2006) (Kozinski, J., dissenting) (emphasis in original). The Ninth Circuit decision would grant the ESA Services a new central role under other statutes. For example, under the federal Resource Conservation and Recovery Act ("RCRA") (42 U.S.C. §§ 6901, *et seq.*), a state may seek "to administer and enforce a hazardous waste ... program ..." by submitting an application to EPA. 42 U.S.C. § 6926(b). EPA then decides whether the application satisfies three criteria. *Id.* If EPA approves a state application for administering a RCRA permitting program, then "[a]ny action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the Administrator under" RCRA. 42 U.S.C. § 6926(d). Further, EPA has a continuing duty to determine whether a state is properly administering and enforcing a hazardous waste permitting program. 42 U.S.C. § 6926(e). If a state is not properly administrating a program and corrective action is not taken, EPA "shall withdraw authorization of such program and establish a Federal program. . . ." *Id.* In light of the Ninth Circuit decision, EPA could be required to ensure ongoing state consultation with the ESA Services for ESA § 7(a)(2) compliance before EPA can delegate RCRA permitting authority to a state. As with NPDES authority under the CWA, a state could be required to demonstrate to EPA that its RCRA permitting program complies with ESA § 7(a)(2) in order to maintain such a permitting program. Likewise, EPA could be required to withdraw its approval of a RCRA permitting program if a state does not implement procedures to demonstrate to EPA that it is in compliance with ESA § 7(a)(2).

Another example of a statute that could be affected by the Ninth Circuit's ruling is the federal Clean Air Act ("CAA") (42 U.S.C. §§ 7401, *et seq.*). Under the CAA, states were required to develop and submit to EPA a permit program within three years after the enactment of the CAA. 42 U.S.C.

§ 7661a(d). If a state program was not approved within two years, EPA was required to administer a permitting program for that state. 42 U.S.C. § 7661a(d)(3). If a state has delegated permitting authority, EPA is then charged with a continuing duty to determine whether "a permitting authority is not adequately administering and enforcing a program, or portion thereof, in accordance with the requirements of" the CAA. 42 U.S.C. § 7661a(i)(1) & (2). If EPA determines a state is not properly administering a permitting program, EPA is required to issue a notice to the state. 42 U.S.C. § 7661a(i)(1). If the state has not come into compliance with the CAA within 18 months after the notice is issued, EPA is required to impose sanctions. 42 U.S.C. § 7661a(i)(2) (". . . the Administrator shall apply the sanction under section 179(b)."). Under the Ninth Circuit decision, states could be subject to sanctions under the CAA for noncompliance with ESA § 7(a)(2). In addition, EPA is required to object to a proposed permit from a state "[i]f any permit contains provisions that are determined by the Administrator as not in compliance with the applicable requirements of [the CAA], including the requirements of an applicable implementation plan. . . ." 42 U.S.C. § 7661d(b)(1) ("the Administrator **shall** . . . object to its issuance.") (emphasis added). Under the Ninth Circuit rationale, EPA could be required to object to CAA permits that are not issued in compliance with the requirements of ESA § 7(a)(2).[9]

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9. As with the CWA, there is also evidence that ESA§ 7(a)(2) is affecting the CAA permitting program. A challenge has been brought against a Prevention of Significant Deterioration ("PSD") permit based on alleged noncompliance with ESA § 7(a)(2). *See In re: Indeck-Elwood, L.L.C.*, PSD Appeal No. 03-04, slip op. at 18-19 (Environmental Appeals Board, Sept. 27, 2006) (Petitioners challenged the Illinois Environmental Protection Agency's issuance of a PSD permit in part on the ground that the state agency failed to comply with the consultation requirements under ESA § 7).

If Congress had intended for the ESA Services to have overriding authority over EPA under ESA § 7(a)(2), it could have explicitly stated so in the language of the CWA and the ESA. Absent such statutory language, the ESA should not be read to effectively repeal mandatory EPA duties under the CWA. *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (quoting *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)) ("The intention of the legislature to repeal 'must be clear and manifest.'") In accordance with the legislative intent, the CWA and the ESA should peaceably co-exist, with neither act having preemptive power over the other. *Id.* ("The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed legislative intention to the contrary, to regard each as effective.") The Ninth Circuit decision impermissibly ignores the language and intent of the CWA, creating a sweeping effect on the regulated community, including Coalition members, that deserves the attention of the Court.

CONCLUSION

For the reasons set forth above, this Honorable Court should grant the Petitions for writ of *certiorari*.

Respectfully submitted,

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